IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 196 of 1991

For Approval and Signature:

HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

C.I.T.

Versus

TRIMURTI BUILDERS

Appearance:

1. INCOME TAX REFERENCE No. 196 of 1991
MR MANISH R BHATT for Petitioner No. 1
NOTICE UNSERVED for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE A.M.KAPADIA

Date of decision: 28/01/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE A.M.KAPADIA)

In exercise of the powers conferred under Section 256 (1) of the Income-tax Act, 1961 ('the Act' for

short), the Income-tax Appellate Tribunal, Ahmedabad Bench "A" ('the Tribunal' for short), by means of this reference, at the instance of the revenue, has referred the following questions of law, for our opinion, for the assessment year 1983-84:-

"1. Whether, the Appellate Tribunal is right in law and on facts in holding that the provisions of Section 186 (2) of the Income-tax Act were applicable in the instant case though the order of the I.T.O. in effect was an order refusing to grant registration and not cancelling the registration?

2. Whether, the Appellate Tribunal is right in law and on facts in holding that the provisions of Section 186 (2) are applicable and that the requirements of the said Section are not complied with?"

2. The respondent assessee is a firm treated as Unregistered Firm (URF) by the Income-tax Officer vide order dated February 21, 1985. The ex-parte assessment was made against the respondent assessee URF and order came to be passed as a result of persistent non-compliance with the notices issued by the ITO from time to time under sections 143 (2) and 142 (1) of the Act. It appears from the record of the case that on some of the dates fixed for hearing, adjournment applications were moved on behalf of the assessee whereas on some other dates there was no compliance at all. As a result thereof, the ITO fixed hearing of the case on February 18, 1985. In the letter dated 8.2.1995 it has been clearly indicated that in case of non-compliance, the firm would be treated as URF. Notwithstanding receipt of the aforesaid notice, the assessee failed to attend which has resulted in an ex-parte assessment under Section 144 of the Act as also the refusal of registration.

3. CIT (Appeals) dismissed the appeal preferred by the assessee. The CIT (Appeals) recorded the order refusing registration as an order under section 186 (2) of the Act and the letter dated 8.2.1985 of the ITO as a notice within the meaning of Section 186 (2) of the Act.

4. The assessee carried the matter before the Tribunal and before the Tribunal, at the time of hearing, it was contended by the assessee that notices issued by the ITO were under section 143 (2) or 142 (1) of the Act and could not be treated as notices under section 186 (2)

the Act. On the assumption that the letter dated February 8, 1985 was a notice under section 186 (2) of the Act, a submission was made that under the said section a clear notice of 14 days was required to be given, whereas, the hearing was fixed by the ITO on 18.2.1985 and this was definitely less than 14 days in case the period of service was also taken into account, and a plea was made for the grant of registration to the assessee firm placing reliance on various decisions.

5. The Tribunal after considering the rival submissions accepted the view point canvassed by the assessee and observed in para 7 of its judgment as under:-

"We have examined the rival submissions and have also perused the orders of the tax authorities as also the decisions cited at the bar by the learned counsel for the appellant. In our opinion, the registration to the firm has been refused overlooking the relevant provisions of law. Section 186 (2) not only requires a minimum notice of 14 days but also a reasonable opportunity of being heard. In the present case both these aspects are missing since the notice itself is less than the statutory period provided by the Act and as is apparent, the appellant has not been heard. The earlier notices issued by the ITO from time to time can not be treated a notices u/s. 186 (2) since these primarily related to the assessment proceedings for purposes of computing the taxable income. The decisions cited by the learned counsel for the appellant support the aforesaid proposition. We however find that certain relevant facts are not available on record viz., the compliance by the appellant with all the necessary formalities entitling it to registration. Even the date on which the application in form No.12 has been filed is not indicated. For this limited purpose we restore the matter back to the file of the ITO accepting at the same time the arguments advanced on behalf of the appellant".

It is this finding and resultant order which has given rise to the instant reference at the instance of the revenue.

6. We have heard Mr. Manish R. Bhatt, learned Standing Counsel for the revenue. Though the respondent-assessee is not served, we thought it fit not

to wait till the service is effected on the respondent-assessee as the questions referred in this reference are required to be answered in favour of the assessee and against the revenue.

7. The only contention which is raised by Mr. Bhatt, learned Standing Counsel for the revenue, is that the Tribunal has misdirected itself in invoking provisions of Section 186 of the Act which contemplates cancellation of registration. The learned counsel contended that since the assessee firm was treated as unregistered firm by the ITO vide order dated 21.2.1985, the ITO and CIT (Appeals) were right in invoking the provisions of section 185 of the Act which provide for the procedure for registration of a firm on receipt of application and by the said order what was done by the ITO was refusal to grant registration and not cancellation of the registration. Therefore the Tribunal has committed an error in law in invoking provisions of section 186 (2) of the Act.

8. There is no dispute that the assessee firm was treated as URF by order dated 21.2.1985, therefore, ex-parte assessment came to be passed as there was persistent non-compliance by the assessee to the notices issued under sections 143 and 144 (1) of the Act.

9. It also appears that the letter dated February 8, 1985 written by ITO to the assessee clearly indicated that in case of non-compliance, the firm would be treated as URF. Notwithstanding the aforesaid intimation sent to the assessee, the assessee failed to attend which has resulted into ex-parte assessment under section 144 of the Act and also refusal of registration.

10. At this stage it would be relevant to refer to the following statutory provisions :

Section 184 of the Act lays down the procedure for applying for registration of a firm under the Act. Sub-sections (7) and (8) thereof are relevant and read as under:-

184.(7) Where registration is granted to any firm for any assessment year, it shall have effect for every subsequent assessment year :

Provided that there is no change in the constitution of the firm or the shares of the partners as evidenced by the partnership deed on the basis of which the registration was granted

and at the time of filing the return of income within the time limit allowed under section 139, the firm makes a declaration to that effect in the prescribed form and manner.

184.(8) Where any such change has taken place in the previous year, the firm shall apply for fresh registration for the assessment year concerned in accordance with the provisions of this section.

Section 185 provides for procedure to be followed by ITO on receiving application for registration of a firm under the Act. Sub-section (5) thereof reads as under:-

185.(5) Notwithstanding anything contained in this section, where, in respect of any assessment year, there is, on the part of a firm, any such failure as is mentioned in section 144, the Income-tax Officer may refuse to register the firm for the assessment year.

Section 186 provides for cancellation of a firm which has already been registered or registration of which continues under Section 184(7). Sub-section (2) of Section 186 reads as under:-.

186. (1) .....

(2) If, where a firm has been registered or its registration has effect under sub-section (7) of section 184 for any assessment year, there is, on the part of the firm, any such failure in respect of the assessment year as is mentioned in section 144, the Income-tax Officer may cancel the registration of the firm for the assessment year, after giving the firm not less than fourteen days' notice intimating his intention to cancel its registration and after giving it a reasonable opportunity of being heard.

Since both Section 185(5) and Section 186(2) refer to failure mentioned in Section 144, the said section is also reproduced:-

144. If any person -

(a) fails to make the return required by any notice given under sub-section (2) of section 139 and has not made a return or

a revised return under sub-section (4) or sub-section (5) of that section, or

(b) fails to comply with all the terms of a notice issued under sub-section (1) of section 142 or fails to comply with a direction issued under sub-section (2A) of that section, or

(c) having made a return, fails to comply with all the terms of a notice issued under sub-section (2) of section 143,

the Income-tax Officer, after taking into account all relevant material which the Income-tax Officer has gathered, shall make the assessment of the total income or loss to the best of his judgement and determine the sum payable by the assessee or refundable to the assessee on the basis of such assessment.

11. The thrust of Mr Bhatt's submission is that since the Tribunal has also noted that the notices under Sections 143(2) and 142(1) were issued to the assessee on several occasions, the provisions of sub-section (5) of Section 185 read with Section 144(b) were clearly attracted.

Although the argument may seem attractive at the first blush, on closer scrutiny it cannot be accepted. When the provisions of sub-section (2) of Section 186 are contrasted with the provisions of sub-section (5) of Section 185, it becomes clear that where a firm has been earlier registered or its registration has effect under sub-section (7) of Section 184 for any assessment year, it is the provisions of sub-section (2) of Section 186 which will apply and not the provisions of sub-section (5) of Section 185. This is obvious because both the aforesaid provisions make a reference to the failure on the part of a firm as is mentioned in Section 144. Hence, merely because the firm failed in responding to the notices under Section 142(1) or 143(2), the Income-tax Officer cannot invoke the provisions of sub-section (5) of Section 185. Those provisions are applicable only where a firm has not been previously registered nor has its registration the effect under sub-section (7) of Section 184 for any assessment year.

In the facts of the instant case, the registration has been refused for the assessment year 1983-84. In view of the specific provisions of

sub-section (6) of Section 184 that where registration is granted to any firm for any assessment year, it shall have effect for every subsequent assessment year provided that there is no change in the constitution of the firm or the shares of the partners and at the time of filing the return of income within the time limit allowed under section 139, the firm makes a declaration in the prescribed form and manner that there is no change in the constitution of the firm or the shares of the partners as evidenced by the partnership deed on the basis of which the registration was granted. The Tribunal's order, therefore, proceeds on the basis of the aforesaid factual condition precedent. Nothing is shown from the record that this factual assumption made by the Tribunal is incorrect.

12. Of course, Mr MR Bhatt, learned counsel for the revenue has submitted that in view of the absence of any categorical statement in the statement of case about the assessee-firm having been registered for any previous assessment year, the matter may be kept open.

Although we would not have acceded to such request, as the dispute is about registration for the assessment year 1983-84 and the Tribunal had also decided the matter in the year 1990, but since the Tribunal itself has restored the matter before the Income-tax Officer for verification of compliance by the assessee with all the necessary formalities entitling it to registration, we direct that if the Income-tax Officer has so far not decided the matter after the order of remand by the Tribunal, the Income-tax Officer shall also ascertain whether the assessee-firm was registered for any previous assessment year. However, if the Income-tax Officer has already decided the matter on the basis of the order passed by the Tribunal, we do not intend to reopen the matter and would proceed on the basis that the Tribunal had applied the provisions of sub-section (2) of Section 186 on the correct factual premise that the assessee was granted registration for an earlier assessment year.

13. On a fair reading of Section 186(2), it is abundantly clear that where a firm has been registered or its registration has effect under sub-section (7) of section 184 for any assessment year, there is, on the part of the firm, any such failure in respect of the assessment year as is mentioned in section 144, the Income-tax Officer may cancel the registration of the firm for the assessment year, after giving the firm not less than fourteen days' notice intimating his intention

to cancel its registration after giving it a reasonable opportunity of being heard.

14. Admittedly, in the instant case, the assessing officer has cancelled the registration ignoring the provisions of sub-section (2) of section 186 of the Act, which requires minimum notice period of 14 days. Besides this, a reasonable opportunity of being heard was also not given to the assessee. Undoubtedly, the earlier notices issued by ITO from time to time cannot be treated as notice under section 186 (2) of the Act since those notices primarily related to the assessment proceedings for the purposes of computing the taxable income. In aforesaid view of the matter, the Tribunal was right in quashing and setting aside the order dated 21.2.1985 passed by the ITO as confirmed by CIT (Appeals) and also restoring the matter to the file of the ITO since relevant facts were not available on record, i.e., compliance by the assessee with all the necessary formalities entitling it to registration. The Tribunal has observed that even the date on which the application in Form No.12 has been filed is not indicated.

15. Seen in the above context, though the order of ITO in effect is an order refusing to grant registration and not cancelling the registration, in our opinion, if the assessee-firm was granted registration for any previous assessment year, the Tribunal is right in holding that the provisions of section 186 (2) of the Act are applicable to the facts of the case of the assessee and the Tribunal is also right in holding that the requirements of the said section are not complied with.

16. If the Income-tax Officer has not already decided the matter pursuant to the order dated 13.9.1990 of the Tribunal restoring the matter before the Income-tax Officer, we direct that the Income-tax Officer shall verify whether the assessee-firm was granted registration for any assessment year prior to the assessment year 1983-84.

If, however, the Income-tax Officer has already decided the matter pursuant to the order dated 13.9.1990 of the Tribunal, our answer to both the questions would be in the affirmative, i.e. in favour of the assessee and against the revenue.

The reference stands disposed of accordingly.

(M.S. Shah, J.) (A.M. Kapadia, J.)

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